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No. 82-1719
IN THE

Supreme Court of the United States

October Term, 1982

FORUM INTERNATIONAL LTD., a New York corporation; and PENTHOUSE INTERNATIONAL, LTD., a New York corporation,

Petitioners,

vs.

CHER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CONTENTS

Page

Statement of the Case 1

Summary of Argument 4

Argument for Not Granting Writ 5

I.

The Case Presents No Important Questions 5

II.

Any Right to Use a Person's Name and Photograph in Incidental Advertising May Be Lost if the Usage Goes Beyond Mere Incidental Usage or Amounts to an Endorsement 5

III.

Conclusion 8

TABLE OF AUTHORITIES

Cases

Booth v. Curtis Publishing Co., 15 App.Div.2d 343, 223 N.Y.S.2d 737, aff'd, 11 N.Y.2d 907 (1962) 6

Namath v. Sports Illustrated, 80 Misc.2d 531, 363 N.Y.S.2d 276 (1975), aff'd, 39 N.Y.2d 897 (1976) 5, 6, 7

Statutes

Civil Code, Sec. 3344 6

Civil Code, Sec. 3344(e) 6

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Statement of the Case.

The Statement of the Case set forth in Petitioners' Petition is incomplete in that it fails to inform this Court of the language of the advertisements, and the usage of Cher's name and likeness therein, on which the Trial Court and the Ninth Circuit based their decisions. Therefore, this Statement of the Case is necessary.

The Trial Court in this case awarded damages to Petitioner, Cher, for misuse of her name and likeness in advertising, and the Ninth Circuit upheld the full amount of the award. The Ninth Circuit held that the usages of Cher's name and likeness in Petitioners' advertisements supported a finding that the usage was more than a mere "incidental"

usage. (App. pp. 8-10).[1] It held that the usages in question supported findings that, at the very least, they falsely implied an endorsement by Cher of *Forum* magazine, and that they were published with reckless disregard for the truth. (App. pp. 8-10).

The offending advertisements were contained in a series of advertisements encouraging members of the public to purchase *Forum* magazine. They included a newspaper advertisement, two different cut-out subscription advertisements, and a radio advertisement. (App. pp. 15-16).

The advertisements were published by Petitioners against a background of Cher having given an interview to *US* magazine, a rival of *Forum* magazine, which interview was not published (App. p. 14), and *Forum* magazine having purchased the interview from the *US* interviewer. (App. p. 15). Cher had not dealt with *Forum* magazine, had not authorized the publication of the interview by *Forum* magazine, did not endorse *Forum* magazine, and was not a reader of *Forum* magazine. (App. p. 17).

In the newspaper advertisement, published in excess of 100 times in at least 27 newspapers around the United States and Canada, there appeared a prominent photograph[2] of Cher along with the following bold headline and subscript:

> "FORUM
> Cher Never Told Anyone How She Played Kiss and Tell With Rock Star Gene Simmons . . . She Told Forum Magazine." (Trial Court Exhibit 17).[3]

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[1]All Appendix references are to Petitioners' Petition for Writ of Certiorari on file herein.

[2]The photographs of Cher in each of the advertisements herein were not reproductions of the magazine cover as published, but, rather, were free-standing photographs of Cher.

[3]Trial Court exhibits are not on file with this Court.

The cut-out subscription advertisement published in two issues of *Penthouse* magazine also contained a prominent photograph of Cher with the following bold headline:

> "There are certain things that Cher won't tell People and would never tell Us. She tells Forum." (Trial Court Exhibit 5).

As part of the text of such subscription advertisement, the following language appeared:

> "Only in FORUM could Cher tell things that she wouldn't breathe a word of anywhere else. So take a tip from Cher and hundreds of thousands of other adventurous people and subscribe to FORUM." (Trial Court Exhibit 5).

The cut-out subscription advertisement published in two issues of *Forum* magazine likewise contained a prominent photograph of Cher with the following bold headline:

> "There are certain things that Cher won't tell People and would never tell Us. She tells Forum." (Trial Court Exhibit 18).

As part of the text of the subscription advertisement, the following language appeared:

> "So join Cher and FORUM's hundreds of thousands of other adventurous readers today. Just fill in the coupon to begin your 1 year subscription for only $15!" (Trial Court Exhibit 18).

Finally, the radio advertisement, which was broadcast in excess of 700 times over at least 100 radio stations around the United States (App. p. 16), contained the following statement:

> "In Forum's exclusive interview, you'll also find out why Cher doesn't think that being a sex symbol is enough." (Trial Court Exhibit 6).

None of these advertisements was authorized by Cher, and no representative of Petitioners made any effort whatsoever to seek Cher's permission. (App. p. 15).

Summary of Argument.

Cher's argument herein is that the issue presented is not an important legal or constitutional issue, but rather a factual one. The question is not whether Petitioners are constitutionally privileged to use a person's name and likeness in subscription advertisements which are merely "incidental" to an article about that person. Both the Trial Court and Ninth Circuit assumed that such was the appropriate standard.

However, both lower courts concluded that Petitioners went beyond a mere "incidental" usage and that the usages constituted an endorsement of *Forum* magazine by Cher. Under such facts, a magazine loses its protection. The language of the advertisements, such as "So take a tip from Cher . . . and subscribe to Forum" and "So join Cher and . . . other adventurous readers . . .", is so clearly language of endorsement that the facts of this case do not justify review by this Court.

ARGUMENT FOR NOT GRANTING WRIT.

I.

The Case Presents No Important Questions.

This case presents no novel questions of law or constitutional issues, but rather, it is a simple case of an improper usage of a person's name and photograph for advertising. There is no question that Cher's name and photograph were used in advertisements by Petitioners to solicit subscriptions to *Forum* magazine. Petitioners do not contest this.

Petitioners' argument, rather, is that the usages were merely "incidental" to the article itself and, therefore, permissible. However, the constitutional issue of law of whether a magazine can make such "incidental" usage is not before this Court. Both the Trial Court and the Ninth Circuit assumed that such constitutional protection did, in fact, apply in this case (App. B, p. 22; App. A, p. 8); however, both lower courts concluded that the facts amply justified a finding that the usage went beyond a mere "incidental" usage (*Id.*) and that the advertisements were published with knowledge of the falsity of Cher's endorsement or with reckless disregard for the truth. (App. B, p. 22; App. A, pp. 9-10).

The only real question presented to this Court by Petitioners is whether the facts amount to a mere "incidental" use, or whether they go beyond that and amount to an express or implied endorsement. This factual issue, having been squarely confronted and decided by the Trial Court and the Ninth Circuit, is not the kind of important issue which this Court should undertake to rule upon.

II.

Any Right to Use a Person's Name and Photograph in Incidental Advertising May Be Lost if the Usage Goes Beyond Mere Incidental Usage or Amounts to an Endorsement.

Petitioners cite the case of *Namath v. Sports Illustrated*, 80 Misc.2d 531, 363 N.Y.S.2d 276 (1975), *aff'd*, 39 N.Y.2d 897 (1976), for the proposition that a magazine may use a

person's name and photograph in advertisements for the magazine where it is merely an adjunct to, or is only incidental to, a protected publication about that person in that magazine. However, the language of *Namath* itself makes it clear that such a right is not unlimited:

> "The language of the Namath advertisement relied upon in the dissent does not indicate plaintiff's indorsement of the magazine *Sports Illustrated*. Had that been the situation, a completely different issue would have been presented. Rather, that language merely indicates to the readers of those advertisements, the general nature of the contents of what is likely to be included in future issues of the magazine." (48 App.Div.2d at 488).

Likewise, in *Booth v. Curtis Publishing Co.*, 15 App.Div.2d 343, 223 N.Y.S.2d 737, *aff'd* 11 N.Y.2d 907 (1962), on which the *Namath* Court relied, it was pointed out that, "[E]ssential to the holding is that there was nothing in the reproduction which . . . could reasonably suggest that Miss Booth had indorsed the magazine . . ." (15 App.Div.2d at 350).

The standard in California is reflective of the above language. Civil Code Sec. 3344 prohibits the usage of a person's name, photograph, or likeness in advertising. Subdivision (e) thereof makes it a question of fact as to whether the usage was "so directly connected with the commercial sponsorship or with the paid advertising" as to constitute a violation.

In the present case, both the Trial Court and the Ninth Circuit concluded that the facts presented went beyond a mere description of the content and quality of *Forum* magazine. The Ninth Circuit, for example, pointed out that the language that Cher "tells *Forum*" is patently false, as Cher never "told" *Forum* anything, having given her exclusive

interview in the first instance to *US* magazine. (App. A, p. 8).

Similarly, the language "So take a tip from Cher . . . and subscribe to FORUM" is an express, unequivocal endorsement of *Forum* magazine, prohibited even under the *Namath* case. The same is true with respect to the language "So join Cher and hundreds of thousands of other adventurous readers today." This is also language of express endorsement in that it states that Cher is a reader of *Forum* and that others should join her in subscribing to *Forum* magazine.

The issue of whether or not these usages constitute an endorsement is not even a close one. The language of endorsement is clear on the face of the advertisements. If a court were to hold that such language did not constitute an actionable misappropriation, it would be difficult to imagine any language of endorsement strong enough to withstand the kind of protection proposed here. The effect of such a ruling would be to set aside an entire body of statutory and common law in almost every state protecting a person's right to prevent his or her name from being used as an endorsement for a product without permission.

By way of example, the ruling Petitioners are seeking herein would permit a magazine of the Communist Party to print a truthful article about a non-communist public figure, which it has a constitutional right to do, and then take out advertisements for subscriptions to their magazine using the language "so take a tip from (that person) and subscribe to (the communist magazine)", or "So join (that person) and other readers of (the communist magazine)." Such a ruling by this Court would be extremely dangerous and should not even be considered.

III.
Conclusion.

For the reasons stated herein, it is respectfully requested that this Court deny Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED: May 17, 1983.

Respectfully submitted,

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